



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2011-0033; FRL-9740-5]**

#### **Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve revisions to the New Mexico SIP to update the New Mexico NNSR and PSD SIP permitting programs consistent with federal requirements. EPA proposes to find that these revisions to the New Mexico SIP meet the Federal Clean Air Act (the Act or CAA) and EPA regulations, and are consistent with EPA policies. New Mexico submitted the PSD and NNSR SIP permitting revisions in two SIP submittals on June 11, 2009, and May 23, 2011. EPA is proposing this action under section 110 and parts C and D of the Act.

**DATES:** Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2011-0033, by one of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- U.S. EPA Region 6 “Contact Us” Web site: <http://epa.gov/region6/r6comment.htm>. Please click on “6PD (Multimedia)” and select “Air” before submitting comments.
- E-mail: Ms. Adina Wiley at [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- Fax: Ms. Adina Wiley, Air Permits Section (6PD-R), at fax number 214-665-6762.
- Mail: Ms. Adina Wiley, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.
- Hand or Courier Delivery: Ms. Adina Wiley, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R06-OAR-2011-0033. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI)

or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays.

Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214-665-7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas, 75202.

The State submittal is also available for public inspection during official business hours by appointment: New Mexico Environment Department, Air Quality Bureau, 1301 Siler Road, Building B, Santa Fe, New Mexico 87502.

**FOR FURTHER INFORMATION CONTACT:** Ms. Adina Wiley, Air Permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone 214-665-2115; fax number 214-665-6762; e-mail address *wiley.adina@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” means EPA.

**Table of Contents:**

- I. Background for Our Proposed Action
- II. Analysis of State Submittals
  - A. Analysis of Submitted Revisions to the New Mexico Prevention of Significant Deterioration Permitting SIP Program

1. NSR PM<sub>2.5</sub> Rule

- a. What are the requirements of the NSR PM<sub>2.5</sub> Rule for PSD SIP Programs?
- b. How does the May 23, 2011 New Mexico PSD submittal satisfy the NSR PM<sub>2.5</sub> Rule?
  - i. “Condensables” Provision

2. PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule

- a. What are the requirements of the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule for PSD SIP Programs?
  - i. What are PSD Increments?
  - ii. What are PSD SILs and SMC?
    - (a) Significant Impact Levels (SILs)
    - (b) Significant Monitoring Concentration (SMC)
    - (c) SILs – SMC Litigation
- b. How does the May 23, 2011 New Mexico PSD submittal satisfy the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule?

3. Reasonable Possibility in Recordkeeping Rule

- a. What are the requirements of the Reasonable Possibility in Recordkeeping Rule for PSD SIP Programs?
- b. How does the May 23, 2011 New Mexico PSD submittal satisfy the Reasonable Possibility in Recordkeeping Rule?

B. Analysis of Submitted Revisions to the New Mexico Nonattainment New Source

## Review Permitting SIP Program

1. Phase 2 8-Hour Ozone Implementation Rule
  - a. What are the requirements of the Phase 2 8-Hour Ozone Implementation Rule for NNSR SIP Programs?
  - b. How does the June 11, 2009 New Mexico NNSR submittal satisfy the Phase 2 8-Hour Ozone Implementation Rule?
2. NSR PM<sub>2.5</sub> Rule
  - a. What are the requirements of the NSR PM<sub>2.5</sub> Rule for NNSR SIP Programs?
  - b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the NSR PM<sub>2.5</sub> Rule?
3. PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule
  - a. What are the requirements of the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule for NNSR SIP Programs?
  - b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule?
4. Reasonable Possibility in Recordkeeping Rule
  - a. What are the requirements of the Reasonable Possibility in Recordkeeping Rule for NNSR SIP Programs?
  - b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the Reasonable Possibility in Recordkeeping Rule?

## III. Proposed Action

#### IV. Statutory and Executive Order Reviews

##### **I. Background for Our Proposed Action**

The Act at section 110(a)(2)(C) requires states to develop and submit to EPA for approval into the state SIP, preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the New Source Review (NSR) SIP. The CAA NSR SIP program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS – “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – “unclassifiable areas.” The NNSR SIP program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – “nonattainment areas.” The Minor NSR SIP program addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain thresholds and thus do not qualify as “major” and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR program. EPA regulations governing the criteria that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR sections 51.160 - 51.166; 52.21, 52.24; and part 51, Appendix S.

New Mexico submitted on June 11, 2009, and May 23, 2011, a collection of regulations for approval by EPA into the New Mexico SIP for PSD and NNSR permitting regulations. New Mexico adopted these regulations and submitted them for SIP approval to ensure consistency with the federal PSD and NNSR permitting requirements associated with two recently promulgated NAAQS for 8-hour ozone and PM<sub>2.5</sub>. Specifically, the June 11, 2009, and May 23, 2011, New Mexico SIP submittals address PSD and NNSR permitting requirements promulgated in EPA's Phase 2 8-hour Ozone Implementation Rule (70 FR 71612, November 29, 2005), NSR PM<sub>2.5</sub> Rule (73 FR 28321, May 16, 2008), PM<sub>2.5</sub> PSD Increment – Significant Impact Levels (SILs) – Significant Monitoring Concentration (SMC) Rule (75 FR 64864, October 20, 2010) and Reasonable Possibility in Recordkeeping Rule (72 FR 72607, December 21, 2007). Today's proposed action and the accompanying TSD present our rationale for proposing approval of these regulations as meeting the minimum federal requirements for the adoption and implementation of the PSD and NNSR SIP permitting programs. Because the PSD and NNSR SIP permitting programs are two separate, distinct programs under Title I of the Act, this proposed action and the accompanying TSD will present a review of the submitted New Mexico rules first for consistency with PSD SIP requirements, followed by the NNSR SIP requirements as applicable.

## **II. Analysis of State Submittals**

### June 11, 2009 Submittal



In a letter dated June 11, 2009, Governor Richardson submitted revisions to the New Mexico SIP that were adopted by the New Mexico Environmental Improvement Board (NMEIB) on July 31, 2009, and became effective on August 31, 2009. This SIP submittal included revisions to the following Parts of the New Mexico Air Code (NMAC):

- Revisions to the General Definitions at 20.2.2 NMAC,
- Revisions to the New Mexico PSD Permitting Program at 20.2.74 NMAC, and
- Revisions to the New Mexico NNSR Permitting Program at 20.2.79 NMAC.

Note that EPA SIP-approved the June 11, 2009 revisions to the PSD program at 20.2.74 NMAC on November 26, 2010 (75 FR 72688), effective December 27, 2010. The rulemaking docket for this action is EPA-R06-OAR-2009-0656. EPA has taken no action to date on the June 11, 2009 submitted revisions to 20.2.2 NMAC or 20.2.79 NMAC.

This review will not cover the revisions to the General Definitions for the New Mexico SIP at 20.2.2 NMAC, submitted on June 11, 2009. These provisions are severable from our review of the PSD and NNSR program submittals because each permitting program contains program-specific definitions used in place of the General Definitions. The program-specific definitions for the PSD and NNSR programs are SIP-approved at 20.2.74.7 and 20.2.79.7 NMAC, respectively. The revisions to 20.2.2 NMAC submitted on June 11, 2009, remain before EPA for review and will be addressed in a separate action.

May 23, 2011 Submittal

In a letter dated May 23, 2011, Governor Martinez submitted revisions to the New Mexico SIP that were adopted by the NM EIB on May 3, 2011, and became effective on June 3, 2011. This SIP submittal included revisions to the following Parts of the New Mexico Air Code:

- Revisions to the New Mexico PSD Permitting Program at 20.2.74 NMAC, and
- Revisions to the New Mexico NNSR Permitting Program at 20.2.79 NMAC.

**A. Analysis of Submitted Revisions to the New Mexico Prevention of Significant Deterioration Permitting SIP Program**

EPA's most recent approval to the New Mexico PSD SIP program was on July 20, 2011, at 20.2.74 NMAC, where we updated our approval of the NM PSD SIP to include the revisions adopted by the State on January 1, 2011, for the permitting of greenhouse gas emissions consistent with EPA's Greenhouse Gas Tailoring Rule. *See* 76 FR 43149. Since that time, the State of New Mexico has adopted and submitted for EPA approval one revision to the PSD program on May 23, 2011, affecting the following sections:

- 20.2.74.7 NMAC – Definitions,
- 20.2.74.300 NMAC – Obligations of Owners or Operators of Sources,
- 20.2.74.303 NMAC – Ambient Impact Requirements,
- 20.2.74.306 NMAC – Monitoring Requirements,
- 20.2.74.403 NMAC – Additional Requirements for Sources Impacting Class I Federal Areas,
- 20.2.74.502 NMAC – Significant Emission Rates,

- 20.2.74.503 NMAC – Significant Monitoring Concentrations,
- 20.2.74.504 NMAC – Allowable PSD Increment, and
- 20.2.74.505 NMAC – Maximum Allowable Increases for Class I Waivers.

This revision has been submitted to adopt and implement the requirements for PM<sub>2.5</sub> PSD SIPs in accordance with EPA's May 16, 2008 and October 20, 2010 final NSR PM<sub>2.5</sub> Rule and PM<sub>2.5</sub> PSD Increments – SILs – SMC Rule and the December 21, 2007 Reasonable Possibility in Recordkeeping Rule. The TSD for this rulemaking includes a detailed analysis of the submitted revision and demonstration of how the submittal addresses the federal requirements. The following is a summary of how EPA proposes to find that the May 23, 2011 submitted revisions to the New Mexico PSD SIP meet the requirements of the specified final rules.

## **1. NSR PM<sub>2.5</sub> Rule**

### **a. What are the requirements of the NSR PM<sub>2.5</sub> Rule for PSD SIP Programs?**

On May 16, 2008, EPA finalized the NSR PM<sub>2.5</sub> Rule to implement the PM<sub>2.5</sub> NAAQS. *See* 73 FR 28321. As a result of EPA's final NSR PM<sub>2.5</sub> Rule, states were required to submit applicable SIP revisions to EPA no later than May 16, 2011, to address this Rule's PSD and NNSR SIP requirements. With respect to PSD permitting, the SIP revision submittals are required to meet the following PSD SIP requirements to implement the PM<sub>2.5</sub> NAAQS: (1)

require PSD permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) establish significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and NO<sub>x</sub>); and (3) account for gases that condense to form particles (condensables) in PM<sub>2.5</sub> and PM<sub>10</sub> emission limits in PSD permits.

**b. How does the May 23, 2011 New Mexico PSD submittal satisfy the NSR PM<sub>2.5</sub> Rule?**

New Mexico's May 23, 2011, SIP revision submittal establishes that the State's existing NSR permitting program requirements for PSD apply to the PM<sub>2.5</sub> NAAQS and its precursors. Specifically, the SIP revision submittal adopts and submits for EPA approval the following NSR PM<sub>2.5</sub> Rule PSD provisions: (1) the requirement for NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (SO<sub>2</sub> and NO<sub>x</sub>) and (3) the requirement that condensable PM be addressed in enforceable PM, PM<sub>10</sub> and PM<sub>2.5</sub> emission limits included in PSD permits. EPA proposes to find that New Mexico's May 23, 2011 SIP revision submittal meets the NSR PM<sub>2.5</sub> Rule for PSD and section 110 and part C of the CAA.

**i. "Condensables" Provision**

In the NSR PM<sub>2.5</sub> Rule, EPA revised the definition of "regulated NSR pollutant" for PSD SIP purposes to add a paragraph providing that "particulate matter (PM) emissions, PM<sub>2.5</sub> emissions and PM<sub>10</sub> emissions" shall include gaseous emissions from a source or activity which

condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, PM<sub>2.5</sub> and PM<sub>10</sub> in permits. *See* 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and “Emissions Offset Interpretative Ruling” (40 CFR part 51, Appendix S). A similar paragraph was added to the NNSR SIP provisions of the NSR PM<sub>2.5</sub> Rule but does not include “particulate matter (PM) emissions.” *See* 40 CFR 51.165(a)(1)(xxxvii)(D).

On March 16, 2012, EPA proposed a rulemaking to amend the definition of “regulated NSR pollutant” promulgated in the NSR PM<sub>2.5</sub> Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i), and EPA’s Emissions Offset Interpretative Ruling.<sup>1</sup> *See* 77 FR 15656. The rulemaking proposes to remove the inadvertent requirement in the NSR PM<sub>2.5</sub> Rule that the measurement of condensable “particulate matter emissions” be included as part of the measurement and regulation of “particulate matter emissions.” The term “particulate matter emissions” includes particles that are larger than PM<sub>2.5</sub> and PM<sub>10</sub> and is an indicator measured under various New Source Performance Standards (NSPS) (40 CFR part 60).<sup>2</sup>

New Mexico’s May 23, 2011 SIP submittal revision includes EPA’s definition for regulated NSR pollutant for condensables (at 40 CFR 51.166(b)(49)(vi)), including the term

---

<sup>1</sup> The comment period for this proposed rulemaking ended May 15, 2012.

<sup>2</sup> In addition to the NSPS for PM, it is noted that states regulated “particulate matter emissions” for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

“particulate matter emissions,” as inadvertently promulgated in the NSR PM<sub>2.5</sub> Rule. EPA is, however, proposing to approve into the New Mexico SIP 20.2.74.7(AS)(6) NMAC, the requirement that condensable PM be accounted for in applicability determinations and in establishing emissions limitations for PM<sub>2.5</sub> and PM<sub>10</sub>. Upon final approval of this proposal, New Mexico’s condensable provision will be consistent with the federal rule until EPA finalizes its March 16, 2012, rulemaking. Once EPA finalizes the March 16, 2012 rulemaking, the NMED can choose to initiate further rulemaking to ensure consistency with federal requirements.

## **2. PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule**

### **a. What are the requirements of the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule for PSD SIP Programs?**

EPA finalized the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule to provide additional regulatory requirements under the PSD SIP program regarding the implementation of the PM<sub>2.5</sub> NAAQS for NSR. *See* 75 FR 64864. As a result, the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule required states to submit SIP revisions to adopt the required PSD increments by July 20, 2012. Specifically, the SIP rule requires a state’s submitted PSD SIP revision to adopt and submit for EPA approval the PM<sub>2.5</sub> increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. States could also discretionarily choose to adopt and submit for EPA approval SILs used as a screening tool (by a major source subject to PSD) to evaluate the impact a proposed major source or modification may have on the NAAQS

or PSD increment and a SMC, (also a screening tool) used by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of PM<sub>2.5</sub>. More detail on the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule can be found in EPA’s October 20, 2010 final rule. *See* 75 FR 64864.

**i. What are PSD Increments?**

Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility “will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant.” In other words, when a source applies for a PSD SIP permit to emit a regulated pollutant in an attainment or unclassifiable area, the permitting authority implementing the PSD SIP must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the “maximum allowable increase” of an air pollutant allowed to occur above the applicable baseline concentration<sup>3</sup> for that pollutant. PSD increments prevent air quality in attainment and unclassifiable areas from deteriorating to the level set by the NAAQS. Therefore an increment is the mechanism used to estimate “significant deterioration” of air quality for a pollutant in an area.

---

<sup>3</sup> Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the same air quality at the time of the first application for a PSD permit in the area.

For PSD baseline purposes, a baseline area for a particular pollutant emitted from a source includes the attainment or unclassifiable/attainment area in which the source is located as well as any other attainment or unclassifiable/attainment area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in an ambient pollutant increase of at least  $1 \mu\text{g}/\text{m}^3$  (annual average). *See* 40 CFR 51.166(b)(15)(i) and (ii). Under EPA's existing regulations, the establishment of a baseline area for any PSD increment results from the submission of the first complete PSD permit application and is based on the location of the proposed source and its emissions impact on the area. Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emissions increases. In general, the submittal date of the first complete PSD permit application in a particular area is the operative "baseline date."<sup>4</sup> On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources. Most emissions increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the baseline date restore or expand the amount of increment that is available. *See* 75 FR 64864. As described in the  $\text{PM}_{2.5}$  PSD Increment – SILs – SMC Rule, pursuant to the authority under

---

<sup>4</sup> Baseline dates are pollutant specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.



section 166(a) of the CAA EPA promulgated numerical increments for PM<sub>2.5</sub> as a new pollutant<sup>5</sup> for which the NAAQS were established after August 7, 1977,<sup>6</sup> and derived 24-hour and annual PM<sub>2.5</sub> increments for the three area classifications (Class I, II and III) using the “contingent safe harbor” approach. *See* 75 FR 64864 at 64869 and table at 40 CFR 51.166(c)(1).

In addition to PSD increments for the PM<sub>2.5</sub> NAAQS, the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for “major source baseline date” and “minor source baseline date” to establish the PM<sub>2.5</sub> NAAQS specific dates (including trigger dates) associated with the implementation of PM<sub>2.5</sub> PSD increments. *See* 75 FR 64864. In accordance with section 166(b) of the CAA, EPA required the states to submit revised implementation plans adopting the PM<sub>2.5</sub> PSD increments to EPA for approval within 21 months from promulgation of the final rule (by July 20, 2012). Each state was responsible for determining how increment consumption and the setting of the minor source baseline date for PM<sub>2.5</sub> would occur under its own PSD program. Regardless of when a state begins to require PM<sub>2.5</sub> increment analysis and how it chooses to set the PM<sub>2.5</sub> minor source baseline date, the emissions from sources subject to PSD for PM<sub>2.5</sub> for which construction commenced after October 20, 2010, (major source baseline date) consume the PM<sub>2.5</sub> increment and therefore should be included in the increment analyses occurring after the minor source baseline date is

---

<sup>5</sup> EPA generally characterized the PM<sub>2.5</sub> NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM<sub>10</sub> NAAQS with the NAAQS for PM<sub>2.5</sub> when the PM<sub>2.5</sub> NAAQS were promulgated in 1997. EPA rather retained the annual and 24-hour NAAQS for PM<sub>10</sub> as if PM<sub>2.5</sub> was a new pollutant even though EPA had already developed air quality criteria for PM generally. *See* 75 FR 64864 (October 20, 2010).

<sup>6</sup> EPA interprets 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

established for an area under the state's revised PSD SIP program. New Mexico's May 23, 2011, submitted SIP revision adopts the PM<sub>2.5</sub> increment permitting requirements promulgated in the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule.

**ii. What are PSD SILs and SMC?**

EPA's PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule also established SILs and SMC for the PM<sub>2.5</sub> NAAQS to address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program. The SILs and SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis*, modeled source impacts or monitored (ambient) concentrations, respectively. The *de minimis* principle is grounded in a decision described by the court case *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980). In this case reviewing EPA's 1978 PSD regulations, the court recognized that "there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." 636 F.2d at 360. EPA established such values for PM<sub>2.5</sub> in the PM<sub>2.5</sub> PSD Increment – SILs – SMC rule to be used as screening tools by a major source subject to PSD to determine the subsequent level of analysis and data gathering required for a PSD permit application for emissions of PM<sub>2.5</sub>. See 75 FR 64864. As part of the response to comments in the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule final rulemaking, EPA explained that the agency considers that the SILs and SMC used as *de minimis* thresholds for the various pollutants are useful tools that enable permitting authorities and PSD applicants to screen out "insignificant" activities; however, the fact remains that these values are not required by the Act

as part of an approvable SIP program. EPA believes that most states are likely to discretionarily adopt the SILs and SMC because of the useful purpose they serve regardless of our position that the values are not mandatory as a part of the PSD SIP. Alternatively, states may develop and submit more stringent values for EPA approval into the SIP if they desire to do so or not develop SILs/SMC altogether. In any case, states are not under any statutory SIP-related deadline for revising their PSD programs to add these screening tools. *See* 75 FR 64864, 64900.

**(a) Significant Impact Levels (SILs)**

SILs are numeric values derived by EPA that may be used to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment. The primary purpose of the SILs is to identify a level of ambient impact that is sufficiently low relative to the NAAQS or increments that such impact can be considered insignificant or *de minimis*. Although EPA has not previously incorporated every application of the SILs into the PSD regulations, EPA historically since 1980 has supported the use of the SILs as *de minimis* thresholds to determine whether the predicted ambient impact resulting from the emissions increase at a proposed major new stationary source or modification is considered to cause or contribute to a violation of the NAAQS. Numerous EPA statements and practices have also recognized the use of SILs under the PSD program to determine: (1) when a proposed source's ambient impacts warrants a comprehensive (cumulative) source impact analysis<sup>7</sup> and; (2) the size of the impact

---

<sup>7</sup> A cumulative analysis is a modeling analysis used to show that the allowable emissions increase from the proposed source along with other emission increases from existing sources, will not result in a violation of either the NAAQS or increment.

area within which the air quality analysis is completed. *See* 75 FR 64864.

In the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule, EPA established the SILs threshold which reflects the degree of ambient impact on PM<sub>2.5</sub> concentrations that can be considered *de minimis* and would justify no further analysis or modeling of the air quality impact of a source in combination with other sources in the area because the source would not cause or contribute to an exceedance of the PM<sub>2.5</sub> NAAQS or the PM<sub>2.5</sub> increments. *See* 75 FR 64864. The PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule established SILs to evaluate the impact that a proposed new source or modification may have on the PM<sub>2.5</sub> NAAQS or increment. When a proposed major new source or major modification of PM<sub>2.5</sub> projects, through air quality modeling, an impact less than the PM<sub>2.5</sub> SILs, the proposed construction or modification is considered to not have a significant air quality impact and would not need to complete a cumulative impact analysis involving an analysis of other sources in the area. Additionally, a source with a *de minimis* ambient impact would not be considered to cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS or increments.

The PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule established the PM<sub>2.5</sub> SILs at EPA's existing NNSR SIP regulations at 40 CFR 51.165(b) and the PSD SIP regulations at 40 CFR 51.166(k)(2), 52.21(k)(2) and part 51, Appendix S as optional screening tools. Prior to the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule, the concept of a SIL was not previously incorporated into the PSD SIP regulations but was present in the NNSR SIP regulations. The regulations in 40

---

CFR 51.165(b)<sup>8</sup> establish the minimum requirements for NNSR programs in SIPs but apply specifically to major stationary sources and major modifications located in attainment or unclassifiable/attainment areas. Where a PSD source located in such areas may have an impact on an adjacent nonattainment area, the PSD source must still demonstrate that it will not cause or contribute to a violation of the NAAQS in the adjacent nonattainment area. Where emissions from a proposed PSD source or modification would have an ambient impact in a nonattainment area that would exceed the SILs, the source is considered to cause or contribute to a violation of the NAAQS and may not be issued a PSD permit without obtaining emissions reductions to compensate for its impact. *See* 40 CFR 51.165(b)(2)–(3). New Mexico’s May 23, 2011 SIP submittal addresses the PM<sub>2.5</sub> SILS thresholds and provisions promulgated in the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule at 40 CFR 51.165(b)(2) and 51.166(k)(2).

**(b) Significant Monitoring Concentration (SMC)**

Under the CAA and EPA SIP regulations, an applicant for a PSD permit is required to gather preconstruction monitoring data in certain circumstances. Section 165(a)(7) of the Act calls for “such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any areas which may be affected by emissions from such source.” In addition, section 165(e) requires an analysis of the air quality in areas affected by a proposed major facility or major modification and calls for gathering one year

---

<sup>8</sup> 40 CFR 51.165(b) require states to adopt and submit for approval by EPA as a SIP revision, a preconstruction review permit program for major stationary sources and major modifications that wish to locate in an attainment or unclassifiable area but would cause or contribute to a violation of the NAAQS.

of monitoring data unless the reviewing authority determines that a complete and adequate analysis may be accomplished in a shorter period. These requirements are codified in EPA's PSD SIP regulations at 40 CFR 51.166(m) and PSD Federal Implementation Plan regulations at 40 CFR 52.21(m). In accordance with EPA's Guideline for Air Quality Modeling (40 CFR part 51, Appendix W), the preconstruction monitoring data is primarily used to determine background concentrations in modeling conducted to demonstrate that the proposed source or modification will not cause or contribute to a violation of the NAAQS. SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis*, monitored (ambient) impacts on pollutant concentrations. In EPA's PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule, EPA established a SMC of 4 µg/m<sup>3</sup> for PM<sub>2.5</sub> to be used as a screening tool by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of PM<sub>2.5</sub>.

Using the SMC as a screening tool, sources may be able to demonstrate that the modeled air quality impact of emissions from the new source or modification, or the existing air quality level in the area where the source would construct, is less than the SMC, i.e., *de minimis*, and may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority. *See* 75 FR 64864, 40 CFR 51.166(i)(5) and 52.21(i)(5). As mentioned above, SMCs are not minimum required elements of an approvable SIP under the CAA. This *de minimis* value is widely considered to be a useful component for implementing the PSD program, but is not statutorily required for EPA approval of a state's PSD SIP revision submittal. States can satisfy the statutory requirements for an approvable PSD SIP program by

requiring each PSD applicant to submit air quality monitoring data for PM<sub>2.5</sub> without using *de minimis* thresholds to exempt certain sources from such requirements. States with EPA-approved PSD SIP programs that adopt and submit for EPA approval the SMC for PM<sub>2.5</sub> may use the SMC, once it is part of an approved SIP, to determine when it may be appropriate to exempt a particular major stationary source or major modification from the monitoring requirements under its PSD SIP program. New Mexico's May 23, 2011 submitted SIP revision adopts the SMC threshold.

**(c) SILs-SMC Litigation**

EPA's authority to promulgate the SILs and SMC for PSD purposes has been challenged by the Sierra Club. *See Sierra Club v. EPA*, Case No. 10-1413 (D.C. Circuit Court).<sup>9</sup> Specifically, Sierra Club claims that the SILs and SMC screening tools adopted in the October 20, 2010, rule are inconsistent with the CAA and EPA's *de minimis* authority.<sup>10</sup> EPA responded to Sierra Club's claims in a Brief dated April 6, 2012, which described the Agency's authority to develop and promulgate SILs and SMC.<sup>11</sup> A copy of EPA's April 6, 2012 Brief can be found in the docket for today's proposed action.

---

<sup>9</sup> On April 6, 2012, EPA filed a brief with the D.C. Circuit court defending the Agency's authority to promulgate SILs and SMC for PSD purposes.

<sup>10</sup> EPA interprets section 165(a)(3) of the CAA to allow the use of significance levels as a means to demonstrate that a source will not cause or contribute to any violation of the NAAQS or increments. The terms "cause or contribute to" and "demonstrate" are ambiguous and EPA reasonably interprets the statute to allow sources that do not contribute significantly to ambient air concentrations of PM<sub>2.5</sub> to demonstrate compliance through modeling of the source's impact measured against the SILs.

<sup>11</sup> Additional information on this issue can also be found in an April 25, 2010, comment letter from EPA Region 6 to the Louisiana Department of Environmental Quality regarding the SILs-SMC litigation. A copy of this letter can be found in the docket for today's rulemaking at [www.regulations.gov](http://www.regulations.gov) using docket ID: EPA-R06-OAR-2011-0033.

**b. How does the May 23, 2011 New Mexico PSD submittal satisfy the PM<sub>2.5</sub> Increment – SILs – SMC Rule?**

New Mexico's May 23, 2011 SIP revision submittal adopts the following PSD provisions in the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule: (1) PSD increments for PM<sub>2.5</sub> annual and 24-hour NAAQS pursuant to section 166(a) of the CAA; (2) SILs to be used as a screening tool to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) SMC, also used as a screening tool, to determine the level of data gathering required of a major source in support of its PSD permit application for PM<sub>2.5</sub> emissions.

Specifically, regarding the PSD increments, the submitted SIP revision changes include: 1) the PM<sub>2.5</sub> increments as promulgated in at 40 CFR 51.166(c)(1) and (p)(4) (for Class I Variances) and 2) amendments to the terms “major source baseline date” (at 40 CFR 51.166(b)(14)(i)(c)) and 52.21(b)(14)(i)(c)), “minor source baseline date”(including establishment of the “trigger date”) and “baseline area” (as amended at 40 CFR 51.166(b)(15)(i) and (ii) and 52.21(b)(15)(i)). These changes provide for the implementation of the PM<sub>2.5</sub> PSD increments for the PM<sub>2.5</sub> NAAQS in the state's PSD program. In today's action, EPA is proposing to approve New Mexico's May 23, 2011 submitted SIP revision provisions to address the PM<sub>2.5</sub> PSD increment provisions promulgated in the PM<sub>2.5</sub> PSD Increments SILs-SMC Rule.

---



Regarding the SILs and SMC established in the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule, the Sierra Club has challenged EPA’s authority to promulgate SILs and SMC. In a brief filed in the D.C. Circuit on April 6, 2012, EPA described the Agency’s authority under the CAA to promulgate and implement the SMC and SILs *de minimis* thresholds. With respect to the SMC, New Mexico’s SIP revision submittal includes the SMC of 4 µg/m<sup>3</sup> for PM<sub>2.5</sub> NAAQS at rule 20.2.74.503 NMAC that was added to the existing monitoring SIP exemption at 40 CFR 51.166(i)(5)(i)(c). EPA is proposing to approve the PM<sub>2.5</sub> SMC into the New Mexico PSD SIP as EPA believes the use of the SMC is a valid exercise of the Agency’s *de minimis* authority. Furthermore, New Mexico’s May 23, 2011 submitted SIP revision is consistent with EPA’s current promulgated provisions in the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule. However, EPA notes that future court action may require the adoption and submittal of subsequent rule revisions and SIP revisions from New Mexico.

New Mexico’s SIP revision submittal, adopting the new PSD SIP requirements for PM<sub>2.5</sub> pursuant to the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule also includes new regulatory text matching that at 40 CFR 51.166(k)(2), concerning the implementation of SILs for PM<sub>2.5</sub>. EPA stated in the preamble to the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule that we do not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of regulating authority for use in the PSD SIP permitting process. Nevertheless, as mentioned previously, the PM<sub>2.5</sub> SILs are currently the subject of litigation before the U.S. Court of Appeals. (*Sierra Club v. EPA*, Case No 10-1413, D.C. Circuit). In response to that litigation, EPA has requested that the court remand and vacate the regulatory text in the EPA’s PSD

regulations at paragraph (k)(2) so that EPA can make necessary rulemaking revisions to that text. In light of EPA's request for remand and vacatur and the agency's acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 40 CFR 51.166 and 52.21, EPA does not believe that it is appropriate at this time to act upon that portion of the State's SIP revision submittal that contains the affected regulatory text in the New Mexico PSD regulations, at 20.2.74.303(A) NMAC. Instead, EPA is severing and taking no action at this time with regard to these specific provisions contained in the submitted SIP revision. By severing, we mean that the submitted portions of the SIP revision that address New Mexico's NSR permitting program we are proposing action on in this notice can be implemented independently of the portions of the submittal relating to SILs. EPA anticipates taking action on the PM<sub>2.5</sub> SILs portion of New Mexico's May 23, 2011 PSD SIP revision in a separate rulemaking once the court case regarding the SILs issue has been resolved.

The aforementioned proposed amendments to New Mexico's SIP provide the framework for implementation of PM<sub>2.5</sub> NAAQS in the state's PSD permitting. Based on review and consideration of New Mexico's May 23, 2011 SIP revision submittal, EPA is finding that the New Mexico SIP revision submittals meet the aforementioned PSD permitting provisions promulgated in the NSR PM<sub>2.5</sub> Rule and PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule. Consequently, EPA has made the preliminary determination to approve the SIP revisions submittals into the New Mexico SIP to implement the PSD NSR program for the PM<sub>2.5</sub> NAAQS.

### **3. Reasonable Possibility in Recordkeeping Rule**

**a. What are the requirements of the Reasonable Possibility in Recordkeeping Rule for PSD SIP Programs?**

EPA finalized the Reasonable Possibility in Recordkeeping Rule for PSD and NNSR SIPs on December 21, 2007. *See* 72 FR 72607. As a result, SIP revisions meeting the rule were due to EPA on December 21, 2010. The final rule clarifies the “reasonable possibility” standard promulgated as part of EPA’s 2002 NSR Reform rule. The “reasonable possibility” standard identifies for sources and reviewing authorities the criteria under which an owner or operator of a major stationary source undergoing a physical change or change in the method of operation that does not trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping and reporting requirements on such sources. This final rule is in response to the decision by the U.S. Court of Appeals for the DC Circuit in *New York v. EPA*, 413 F.3d 3 (DC Cir. 2005) in which the “reasonable possibility” standard was remanded for further clarification.

**b. How does the May 23, 2011 New Mexico PSD Submittal Satisfy the Reasonable Possibility in Recordkeeping Rule?**

New Mexico’s May 23, 2011 SIP revision submittal adopts new provisions at 20.2.74.300(E) and (E)(6) NMAC to implement the clarifications to the “reasonable possibility” standard promulgated by EPA on December 21, 2007. The revisions submitted by New Mexico

are consistent with federal PSD SIP requirements at 40 CFR 51.166(r)(6), (r)(6)(vi)(a) and (b). *See* 72 FR 72607, 72616. EPA therefore proposes full approval of these submitted new provisions.

**B. Analysis of Submitted Revisions to the New Mexico Nonattainment New Source Review Permitting SIP Program**

EPA's most recent approval of the New Mexico NNSR SIP program was on September 5, 2007, where we updated our approval of the NM NNSR SIP program to include the revisions to address NSR Reform as adopted by the State on December 6, 2005. *See* 72 FR 50879. Since that time, the State of New Mexico has adopted and submitted revisions on June 11, 2009, and May 23, 2011, to the NNSR SIP program, affecting the following sections:

- 20.2.79.7 NMAC – Definitions (both June 11, 2009 and May 23, 2011)
- 20.2.79.109 NMAC – Applicability (both June 11, 2009 and May 23, 2011)
- 20.2.79.115 NMAC – Emission Offsets (June 11, 2009)
- 20.2.79.119 NMAC – Tables, Significant Ambient Concentrations (May 23, 2011)

These revisions have been submitted for approval by EPA to the NNSR SIP to adopt and implement the requirements in the November 29, 2005 Phase 2 8-hour Ozone Implementation Rule, the May 16, 2008 NSR PM<sub>2.5</sub> Rule, the October 20, 2010 PM<sub>2.5</sub> PSD Increments – SILs – SMC Rule, and the December 21, 2007 Reasonable Possibility in Recordkeeping Rule. The TSD for this rulemaking includes a detailed analysis of the submitted revisions and

demonstration of how each revision addresses the federal requirements. The following is a summary of how EPA proposes to find the June 11, 2009 and May 23, 2011 revisions to the New Mexico NNSR program implement the requirements of the specified final rules.

## **1. Phase 2 8-Hour Ozone Implementation Rule**

### **a. What are the requirements of the Phase 2 8-Hour Ozone Implementation Rule for NNSR SIP Programs?**

As a result of the Phase 2 8-Hour Ozone Implementation Rule, states were required to submit applicable SIP revisions to EPA no later than June 15, 2007, to address this Rule's SIP requirements for both the PSD and NNSR programs. *See* 70 FR 71612, 71683. The SIP revision submittals were required by this Rule to revise the major source thresholds, significant emission rates, and offset ratios for ozone such that nitrogen oxides (NO<sub>x</sub>) are recognized as an ozone precursor. New Mexico's June 11, 2009 SIP submittal included revisions to the PSD and NNSR programs to address these 8-hour ozone permitting requirements. EPA previously approved the June 11, 2009 submitted revisions to the PSD program addressing Phase 2 8-hour ozone implementation as part of the New Mexico PSD SIP.<sup>12</sup> Consequently, our action today only

---

<sup>12</sup> *See* 75 FR 72688, November 26, 2010. EPA previously approved revisions addressing NO<sub>x</sub> as a precursor of the 1997 8-hour ozone NAAQS in its action finding New Mexico's SIP does not interfere with measures required to prevent significant deterioration of air quality in other states for this NAAQS as per the third element of section 110(a)(2)(D). Approval of those revisions ensured New Mexico's PSD SIP included changes necessary to implement the 1997 8-hour ozone NAAQS within the state as contemplated in the August 15, 2006 "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards" to meet the third element of section 110(a)(2)(D).

addresses the NNSR submitted program revisions that address the SIP requirements of this Phase 2 8-Hour Ozone Implementation Rule.

**b. How does the June 11, 2009 New Mexico NNSR Submittal Satisfy the Phase 2 8-Hour Ozone Implementation Rule?**

New Mexico's June 11, 2009 SIP submission includes new provisions to implement the NNSR SIP requirements of the Phase 2 8-hour Ozone Implementation Rule as promulgated by EPA on November 29, 2005. Specifically, New Mexico adopted revisions to the definitions of "major stationary source" and "significant", added new provisions to the source applicability requirements, and added new provisions to the emission offset requirements. These revisions serve to incorporate the major stationary source thresholds, significant emission rates and offset ratios pursuant to part D of title I of the CAA for the 8-hour ozone NAAQS, the CO NAAQS, and the PM<sub>10</sub> NAAQS. New Mexico also adopted revisions to the requirements for emission reductions achieved through curtailments or shutdowns consistent with federal requirements. Based on our review and analysis available in the TSD for this action, we are proposing approval of the June 11, 2009 revisions to the New Mexico SIP that implement the NNSR SIP requirements of the Phase 2 8-hour ozone rule consistent with requirements at 40 CFR 51.165.

**2. NSR PM<sub>2.5</sub> Rule**

**a. What are the requirements of the NSR PM<sub>2.5</sub> Rule for NNSR SIP Programs?**

On May 16, 2008, EPA finalized the NSR PM<sub>2.5</sub> Rule to implement the PM<sub>2.5</sub> NAAQS. *See* 73 FR 28321. As a result of EPA's final NSR PM<sub>2.5</sub> Rule, states were required to submit applicable SIP revisions to EPA no later than May 16, 2011, to address this Rule's PSD and NNSR SIP requirements. Specifically, the SIP revision submittals are required to meet the following NNSR SIP requirements to implement the PM<sub>2.5</sub> NAAQS: (1) require NNSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) establish significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and NO<sub>x</sub>); (3) establish PM<sub>2.5</sub> emission offsets; and (4) account for gases that condense to form particles (condensables) in PM<sub>2.5</sub> and PM<sub>10</sub> emission limits in NNSR permits. Additionally, the NSR PM<sub>2.5</sub> Rule authorized states to adopt and submit provisions in their NNSR rules that would allow interpollutant offset trading.

**b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the NSR PM<sub>2.5</sub> Rule?**

New Mexico's May 23, 2011 submission includes new provisions to implement the NNSR SIP requirements of the NSR PM<sub>2.5</sub> Rule, as promulgated by EPA on May 16, 2008. Specifically, New Mexico adopted revisions to the definitions of "regulated NSR pollutant" and "significant", added new provisions to the source applicability requirements, and added new provisions for emission offset requirements. These submitted revisions (1) require NNSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) establish significant emission rates

for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>)); (3) establish PM<sub>2.5</sub> emission offsets; (4) account for gases that condense to form particles (condensables) in PM<sub>2.5</sub> and PM<sub>10</sub> emission limits in NNSR permits; and (5) provide for interprecursor offsetting of direct PM<sub>2.5</sub> emissions with emissions of identified PM<sub>2.5</sub> precursors based on an approved interprecursor trading hierarchy and ratio in the approved plan for a particular nonattainment area. Note that the language adopted and submitted by the State of New Mexico providing for interprecursor offsetting establishes the generic framework only. EPA is proposing to approve the generic framework as part of the New Mexico SIP. Sources proposing to construct/modify in nonattainment areas, however, will be unable to use interprecursor offsetting unless and until New Mexico adopts and submits said hierarchies and ratios for EPA review and they are subsequently approved by EPA into the New Mexico SIP.

### **3. PM<sub>2.5</sub> PSD Increment –SILs –SMC Rule**

#### **a. What are the requirements of the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule for NNSR SIP Programs?**

The PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule established the PM<sub>2.5</sub> SILs at EPA's existing NNSR SIP regulations at 40 CFR 51.165(b). The regulations in 40 CFR 51.165(b)<sup>13</sup> establish the minimum requirements for NNSR programs in SIPs but apply specifically to major

---

<sup>13</sup> 40 CFR 51.165(b) require states to adopt and submit for approval by EPA as a SIP revision, a preconstruction review permit program for major stationary sources and major modifications that wish to locate in an attainment or unclassifiable area but would cause or contribute to a violation of the NAAQS.



stationary sources and major modifications located in attainment or unclassifiable/attainment areas. Where a PSD source located in such areas may have an impact on an adjacent nonattainment area, the PSD source must still demonstrate that it will not cause or contribute to a violation of the NAAQS in the adjacent nonattainment area. Where emissions from a proposed PSD source or modification would have an ambient impact in a nonattainment area that would exceed the SILs, the source is considered to cause or contribute to a violation of the NAAQS and may not be issued a PSD permit without obtaining emissions reductions to compensate for its impact. *See* 40 CFR 51.165(b)(2)–(3).

**b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule?**

The PM<sub>2.5</sub> PSD Increment – SILs – SMC rule promulgated PM<sub>2.5</sub> SILs thresholds in the NNSR regulations at 40 CFR 51.165(b)(2). New Mexico's May 23, 2011 submission includes the PM<sub>2.5</sub> SILs thresholds at 20.2.79.119 NMAC, consistent with the federal requirement to have the PM<sub>2.5</sub> SILs in EPA's NNSR SIP regulations at 40 CFR 51.165(b)(2). In light of the fact that EPA did not request the court to remand and vacate language at 40 CFR 51.165(b) and the agency has explained and affirmed its authority to develop and promulgate SILs in the brief filed with the D.C. Circuit Court concerning the litigation, EPA is proposing to approve New Mexico's adoption of the PM<sub>2.5</sub> SILs thresholds at 20.2.79.119 NMAC. EPA notes, however, that the SILs-SMC litigation is ongoing and therefore future court action may require the submittal of subsequent rule revisions and SIP submittals from the State of New Mexico.

The aforementioned amendments to New Mexico's NNSR SIP program along with the revisions to the New Mexico PSD SIP program discussed in Section II.A of this proposed action, provide the framework for implementation of PM<sub>2.5</sub> NAAQS in the state's PSD and NNSR SIP programs. Based on our review and analysis, EPA is finding that New Mexico's May 23, 2011 submitted revisions to the NNSR SIP program meet the NNSR permitting provisions promulgated in the NSR PM<sub>2.5</sub> Rule and PM<sub>2.5</sub> PSD Increment – SILs – SMC Rule. Consequently, EPA has made the preliminary determination to approve the May 23, 2011 SIP revision submittals into the New Mexico SIP to implement the NNSR program for the PM<sub>2.5</sub> NAAQS.

#### **4. Reasonable Possibility in Recordkeeping Rule**

##### **a. What are the requirements of the Reasonable Possibility in Recordkeeping Rule for NNSR SIP Programs?**

EPA finalized the Reasonable Possibility in Recordkeeping Rule for PSD and NNSR SIPs on December 21, 2007. *See* 72 FR 72607. As a result, SIP revisions meeting the rule were due to EPA on December 21, 2010. The final rule clarifies the “reasonable possibility” standard promulgated as part of EPA's 2002 NSR Reform rule. The “reasonable possibility” standard identifies for sources and reviewing authorities the criteria under which an owner or operator of a major stationary source undergoing a physical change or change in the method of operation that

does not trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping and reporting requirements on such sources. This final rule is in response to the decision by the U.S. Court of Appeals for the DC Circuit in *New York v. EPA*, 413 F.3d 3 (DC Cir. 2005) in which the “reasonable possibility” standard was remanded for further clarification.

**b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the Reasonable Possibility in Recordkeeping Rule?**

New Mexico’s May 23, 2011 SIP revision submittal includes new provisions at 20.2.79.109(F) and (F)(6) NMAC to implement the clarifications to the “reasonable possibility” standard promulgated by EPA on December 21, 2007. *See* 72 FR 72607, 72616. The revisions submitted by New Mexico are consistent with federal NNSR permitting requirements at 40 CFR 51.165(a)(6), (a)(6)(vi). EPA therefore proposes full approval of these new provisions.

**III. Proposed Action**

EPA is proposing the following actions in accordance with section 110 and parts C and D of the Act and EPA’s regulations and consistent with EPA guidance. EPA is proposing to approve portions of two revisions to the New Mexico SIP submitted by the Governor of New Mexico on June 11, 2009 and May 23, 2011.

EPA is proposing to approve the following revised rules submitted in 2011 as meeting the PM<sub>2.5</sub> PSD requirements under EPA's May 16, 2008 and October 20, 2010 final PM<sub>2.5</sub> PSD permitting implementation rules and the December 21, 2007 Reasonable Possibility in Recordkeeping Rules.

- 20.2.74.7 NMAC – Definitions,
- 20.2.74.300 NMAC – Obligations of Owners or Operators of Sources,
- 20.2.74.303 NMAC – Ambient Impact Requirements,
- 20.2.74.306 NMAC – Monitoring Requirements,
- 20.2.74.403 NMAC – Additional Requirements for Sources Impacting Class I Federal Areas,
- 20.2.74.502 NMAC – Significant Emission Rates,
- 20.2.74.503 NMAC – Significant Monitoring Concentrations,
- 20.2.74.504 NMAC – Allowable PSD Increment, and
- 20.2.74.505 NMAC – Maximum Allowable Increases for Class I Waivers.

EPA is proposing to approve the following revised rules submitted in 2009 as meeting the EPA's November 29, 2005 Phase 2 8-hour Ozone Implementation Rule for nonattainment areas.

- 20.2.79.7 NMAC – Definitions,
- 20.2.79.109 NMAC – Applicability, and
- 20.2.79.115 NMAC – Emission Offsets.

EPA is proposing to approve the following revised rules submitted in 2011 as meeting EPA's PM<sub>2.5</sub> NNSR requirements under EPA's May 16, 2008 and October 20, 2010 final PM<sub>2.5</sub> NSR permitting implementation rules and the December 21, 2007 Reasonable Possibility in Recordkeeping Rules. New Mexico also made some nonsubstantive changes in 2011 to 20.2.79.109 NMAC as adopted and submitted in 2009, and we are proposing to approve these nonsubstantive changes.

- 20.2.79.7 NMAC – Definitions,
- 20.2.79.109 NMAC - Applicability, and
- 20.2.79.119 NMAC - Tables

EPA is severing from this proposed action the revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011 which are equivalent to the provisions EPA has requested the court to remand and vacate at 40 CFR 51.166(k)(2) that were promulgated on October 20, 2010, and conflict with our intentions for the use of SILs to demonstrate compliance with CAA section 163(a). Therefore, 20.2.74.303 NMAC as adopted by NMED on January 1, 2011, and SIP-approved by EPA on July 20, 2011, remains the SIP-approved section. The NMED continues to retain the ability to implement the PM<sub>2.5</sub> SILs at 20.2.79.119 NMAC consistent with EPA's interpretation of CAA section 163(a). Further, the revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011, will remain before EPA for review. EPA will revisit these provisions after the court addresses EPA's request for remand with vacatur or EPA initiates rulemaking to revise 40 CFR 51.166(k)(2).

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 28, 2012.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2012-25156 Filed 10/11/2012 at 8:45 am;

Publication Date: 10/12/2012]